Position regarding draft Opinion of the Venice Commission on the Act on the Constitutional Tribunal of 22 July 2016

Overall assessment of the draft Opinion

The draft Opinion of the Venice Commission of 30 September 2016 no. 860/2016 on the Act on the Constitutional Tribunal repeats the errors of the Opinion of 11 March 2016, reinforces them and, in so doing, tries to exert pressure on the Government of the Republic of Poland so as to reaffirm the past and currently planned illegal actions taken by the Constitutional Tribunal (election of the President of the Constitutional Tribunal). The Opinion is unreliable; it presents one-sided approach, lacks in thoroughness and is ridden with factual errors. It also exceeds the terms of reference of the request for examining the case. It reveals a clear political commitment of the experts who drafted it on the side of the opposition.

Detailed analysis

1. The draft Opinion is the result of the implementation of the request made by Secretary General of the Council of Europe on 12 July 2016, who asked the Venice Commission to examine rapidly whether the draft Act on the Constitutional Tribunal takes into account the Commission's Opinion of 11 March 2016. Due to the fact that the request was made at a time when the text of the statute had not yet taken its final form (the legislative process was not completed, because the Senate had yet to review the draft law), the Secretary General again asked the Commission to review the Act adopted on 22 July 2016. For this reason:

- first, the subject matter of the Opinion should have been the Act on the Constitutional Tribunal of 22 July 2016,
- second, the scope of the Opinion was to take into account the implementation of postulates presented in the Commission's earlier opinion which concerned legislation on the Constitutional Tribunal.

It is not clear why the Commission refers in some parts to differences between the draft Act adopted by the Sejm and the final adopted Act (Section 3 p. 3 and Section 122). The Opinion was supposed to examine the adopted Act, which entered into force and became part of the legal order, instead of comparing the draft law being legislated and its final version.

The Commission has also overstepped the boundaries set in the request of the Secretary General because:

- it hastily and arbitrarily assessed legislative proposals that underwent changes in the course of the legislative process;
- in its Opinion the Commission also referred to issues that did not concern the substance of the Act under review, but the actions taken by public authorities as far as the publication of the decisions of the Constitutional Tribunal and the appointment of judges to the Constitutional Tribunal are concerned.

2. In its assessment, the Commission took as its starting point two standards: the independence of the Judiciary and the position of the constitutional court as the final arbiter in constitutional issues. This uncritical assumption is proof of the Commission's dishonest approach to the drafted Opinion (paragraph 8).

The Commission took it as an axiom that the Tribunal is the final arbiter, but failed to make an effort to familiarize itself with the structure of the political system of the Polish State. A reading of the Constitution of the Republic of Poland would have permitted the Commission to understand that the Constitutional Tribunal is not the only body in Poland that decides about constitutional issues. Pursuant to Article 10(2) of the Constitution, the judicial power

shall be vested in courts and tribunals. This is the place in the Constitution (see paragraph 11) where the Commission's position ends. The Commission does not develop on this further that the tribunals in question are the Constitutional Tribunal and the Tribunal of State. Disregarding the latter in describing the situation with regard to who has the last word in constitutional matters, violates the standard to which the Commission refers – that is the independence of the judiciary and also the separation of powers relating to constitutional matters between the two tribunals.

It should be borne in mind that the Constitutional Tribunal decides about the constitutionality of normative acts of lower rank (referred to in the Constitution) in the Polish legal system. The Constitutional Tribunal also 1) examines the constitutionality of the objectives and activities of political parties, 2) resolves disputes over competencies (not necessarily of constitutional nature!) between constitutional central organs of the State, 3) may rule on a temporary obstacle to the exercise of office by the President of the Republic of Poland and may entrust the temporary exercise of his duties to the Marshal of the Sejm. The Constitution of the Republic of Poland does not accord to the Tribunal features of a 'total' organ that would rule on the constitutionality of all forms of activity engaged in by public authorities. Even when it comes to its power to review the hierarchical compliance of laws, the Tribunal is not in a position to review all normative acts. Acts of local law (at least in its abstract review of them) are exempt from its cognition. Moreover, other organs that guard the Constitution, such as, the President of the Republic of Poland or the Tribunal of State, which rules on constitutional delicts (violations of the Constitution or a statute during the exercise of an office or the holding of a position) among others, must not be ignored.

The Commission's position where it states that the Constitutional Tribunal is also competent to assess actions taken by the government in the area of the application of law and that this competence is exclusively the Tribunal's is also completely incorrect. The Opinion reads: "*The conformity of governmental action, including legislation, with the constitution is ensured by the Constitutional Court, in countries where it exists"* (paragraph 10). This assessment runs amiss of the structure of the political system in Poland and the powers vested by the Constitution in the Constitutional Tribunal to review general and abstract norms.

The Commission repeats this argument also when it discusses the issue of the publication of the Constitutional Tribunal's judgments (see paragraph 81). It again stresses the significance of the Constitutional Tribunal as the final arbiter in constitutional issues, yet it fails to clarify what this means for the position of the Constitutional Tribunal in the system of State organs. The argument that "*[…] the legislature openly questions the position and authority of the Constitutional Tribunal as the final arbiter in constitutional issues."* presented in paragraph 97 is incomprehensible.

3. The substance of the Opinion as outlined by the Secretary General of the Council of Europe in his request should constitute issues contained in its sections IV and V of the draft Opinion. They concern the calendar of events relating to the adoption of the Opinion and information on the Act of the Constitutional Tribunal of 22 July 2016 that is the subject of the Opinion, with the exception that as far as the publication of the rulings and the composition of the Tribunal is concerned, the Opinion should concern only the substance of the norms expressed in the Act in this scope, and not an assessment of the actions of public authorities.

A template for the assessment is the Commission Opinion of 11 March 2016 on the Act amending the Act on the Constitutional Tribunal described in point III. Apart from the non-binding nature of the Opinion, one should consider whether the Venice Commission is authorised to set constitutional standards and to interfere in the domestic affairs of a state and to require that its recommendations be implemented. The unreliable manner in which the

opinion on the Act on the Constitutional Tribunal was drafted and the lack of an understanding of the interdependencies among constitutional organs of the State as far as constitutional issues are concerned makes one doubt the validity of such opinions.

Since the reference point and the determinant of the legality of actions taken by domestic organs of the State is to be an opinion whose value on its merits was questioned both by groups of experts dealing with the issues of the Constitutional Tribunal (see: Report of Group of Experts of the Marshal of the Sejm), and by representatives of the legal doctrine (see: *Przegląd Sejmowy nr 1-4/2016* and *Prawo i Więź* no. 1/2016), a doubt arises as to what is the standard for constitutional judicature – whether it is set by the systemic position occupied by the Constitutional Tribunal or by conclusions stemming from the opinion of an organ which has no authority in treaties binding Poland and is not familiar with the specificity of Polish constitutional law.

4. In section IV, the first substantive fragment of its Opinion, the Venice Commission laid out the calendar of events since the adoption of the Commission Opinion of 11 March 2016. The choice of events mentioned in this calendar is not clear. Actions taken by state organs criticized by the Commission were clearly underlined. The calendar also contains substantive errors, such as, wrong reference to entities which have declared that they would apply the unpublished judgments of the Constitutional Tribunal (see: reference to the resolution of the Presidium of the Supreme Court, instead of the General Assembly of Judges of the Supreme Court, or to the decision of mayors, instead of resolutions of legislative bodies of the territorial self-government). The mistake made in the name of the General Assembly is also repeated in paragraphs 77 and 114 of the Opinion.

What is not clear is the lack of indication of the moment the draft Acts on the Constitutional Tribunal were lodged and of the dates relating to the legislative process that took place regarding these drafts. The Commission has not taken into account the work done on these drafts that took place from May to July 2016. Thus no indication was made of the fact that a debate took place on the shape of the proposed legislative measures which resulted in the Act of 22 July 2016. This was a manipulation to prove the argument that the legislative process was hasty and did not give the possibility to interested actors to familiarize themselves with the legal measures proposed. In view of the fact that the subject matter of the Opinion is this very statute (i.e. the Act of 22 July 2016), issues relating to the legislative process should be accounted specifically in the calendar of events.

What is also incomprehensible is what value has for the drafting of the Opinion and its form the reference made in the calendar to such issues as the institution of criminal proceedings against the President of the Constitutional Tribunal or to a statement made by the chairman of a parliamentary group, the nature of which is not normative (see p. 7 of the Opinion). As regards the event concerning the institution of proceedings, a question arises about the truthfulness and the source of this information and the rationality of quoting it in the Opinion which is supposed to concern a normative act, and as regards the statement made by the parliamentary group's chairman – it has nothing to do with the subject matter of the Opinion. The Commission has not taken up the suggestion made by judges of the Constitutional Tribunal elected in December 2015 to familiarize itself with the documents from the proceedings. The Commission also falsifies information about the person who has submitted the request to the prosecutor's office.

5. When analysing the way in which the Act of 22 July 2016 implemented recommendations contained in the Opinion of 11 March 2016, the Commission did not conduct an in-depth analysis of the Act's legislative process, even though, according to the Commission itself, the opposition informed it about irregularities (paragraphs 20-21). Had the

Commission done so, it would have become aware of the fact that various institutions issued their opinions about the act, which was the subject of debate. Paragraph 21 raises the impression that the opposition had been excluded from the proceedings, which was not the case. The invitation to attend the debate in the committees of the Sejm was extended to all the judges of the Constitutional Tribunal, but they did not accept it.

5.1. When assessing specific measures adopted in the Act, the Commission employed a surprising methodology. Even when looking at provisions that took into account the suggestions made in the Opinion of 11 March 2016, the Commission only refers to and assesses legislative concepts that were not taken into account as a result of the legislative works. This is unreasonable and goes beyond the scope of the Opinion. It seems that the Commission goes out of its way to emphasize that it considers a specific legal measure to be inappropriate. The Commission's task was to present an opinion on whether the new Act on the Constitutional Tribunal implemented the Commission's Opinion of 11 March 2016, rather than to compare the provisions contained in the draft with the final text of the law.

5.2. In the Commission's view, after the new Act increased (from two to three) the number of candidates from among whom the President of Poland appoints the President of the Tribunal, the influence of the Tribunal, which should have a decisive voice in this matter, has been seriously reduced in favour of the President of Poland, especially if one considers that there are currently 12 judges sitting on the Tribunal.

When assessing the election mechanism of the Tribunal's President, the Commission refers to what is alleged to be its own answer to this question. Incidentally, this concept has been advocated (also in public) for a long time now by the President of the Constitutional Tribunal, Andrzej Rzepliński. Besides leaving an impression of partiality, it should be underscored that this does not settle the matter of whether or not the provision of the Act infringes on the relevant fundamental European values. In paragraph 26, the Commission itself states that there is no definitive European standard when it comes to electing constitutional court presidents (paragraph 9 of the Opinion). It is peculiar that the Commission did not cite purely political examples of nominations, e.g. legal solutions applicable in Germany (President of the Federal Constitutional Court is appointed alternately by the Bundestag and the Bundesrat, Section 9 of VerfGG), Austria (President of the Federal Constitutional Court is appointed by the Austrian President on the government's motion, Article 142 (2) of BVefG), or in France (President of the Constitutional Council is appointed by the President of the Republic, Article 56 of the Constitution). Rather than elaborating on this topic, the Commission does not go into much detail and makes the following general comment in footnote 27: "Election of the president of the court is performed by the judges in Albania, Brazil, Croatia, Italy, Kosovo, Latvia, Moldova, Monaco, Portugal, Romania, Serbia, "the former Yugoslav Republic of Macedonia", Turkey and, Ukraine; appointment/election is performed by political organs in: Austria, Belarus, Czech Republic, France, Germany, Hungary, Lithuania, Luxembourg, Netherlands, Norway, Russia, Slovakia, South Africa and Switzerland; see also CDL-STD(1997)020, Report on the Composition of Constitutional Courts - Science and Technique of Democracy, no. 20 (1997) and www.CODICES.coe.int."

In light of the Commission's comment that there is no definitive standard in this regard, the rest of the Commission's remarks do not represent a systemic or legal assessment, but rather an examination of different political aspects.

Meanwhile, Article 194 (2) of the Constitution, which is of fundamental importance in this respect, does not specify how many candidates should be proposed to the President of Poland by the General Assembly of the Judges of the Constitutional Tribunal. If two was the only number of candidates admissible in a democracy, a reasonable lawmaker would have certainly

made such a provision in the Constitution. Moreover, it appears that three candidates out of 15 judges is not an overly high number. It seems that the Venice Commission formulates its concerns on the basis of the current political configuration. What does the proposed solution is to "align with reality" the Polish President's powers regarding the Tribunal, without disrupting the democratic legitimacy of the process of appointing the President of the Tribunal.

Another puzzling point is made in paragraph 25: "In the current situation, when there are only 12 judges, a group of 3 judges can ensure that their preferred candidate is on the list, even though that candidate may not enjoy the confidence of the other judges. It should be noted that 3 of the 12 judges, who participate in decision-making, were elected by the current Sejm."

It is a deliberate endorsement of one political group, while at the same time an effort to stigmatize the judges elected by the current Sejm. This goes to show that the Commission is far from pursuing standards of independent judiciary. It denies those judges the right to stand in elections for the President of the Tribunal, and favours one party to the dispute. The fact that three judges have been barred by the Tribunal's President from adjudicating does not prove that the Constitutional Tribunal consists of 12 judges. The Commission's allegation about the current configuration of the Tribunal is off the point: the procedures for appointing the Tribunal's judges have been effectively concluded, while the only reason why only 12 judges can adjudicate today is the decision by the Tribunal's President to prevent the elected judges from adjudicating.

The point that candidates for President of the Tribunal should enjoy the most support of the other judges is of non-legal nature, and has no basis in the Polish Constitution. The Commission fails to take account of the role played by the Polish President in the process of appointing the President of the Tribunal. There are no other normative criteria set in this respect for the President of Poland than the following: he must act on the basis and within the limits of law (general principle), he chooses the President of the Tribunal from among the candidates proposed by the General Assembly of the Judges of the Constitutional Tribunal (specific principle). He is certainly not bound by the number of votes secured by a candidate of the Assembly. The President of Poland is presented with a resolution stating the names of candidates for the President of the Tribunal. The General Assembly does not adopt separate resolutions with respect to each candidate submitted to the President of Poland. The fact that there is only one resolution indicates that the Assembly has agreed on a list of candidates from among whom the President of Poland must appoint the President of the Tribunal. By adopting this resolution, the General Assembly expresses its endorsement for the candidacies. It is the General Assembly as a body that submits candidates to the President of Poland, not a judge or groups of judges supporting a candidate. The President of Poland is not privy to the results of the vote either.

As the Venice Commission did not sufficiently study the rules of electing the President of the Tribunal, the following demand made in paragraph 29 is unfounded: "Article 16 should be amended to ensure that only candidates with substantial support in the Tribunal can be elected can be proposed to the President of Poland (e.g. by removing the rule that judges have a single vote as well as the requirement that three candidates be proposed)."

Furthermore, it should be stressed that the assessment of the mechanism for electing the Tribunal's President, made by the Commission in the draft Opinion, is inadmissible for two additional reasons:

- First, if the Commission's task was to review the implementation of recommendations made in the Opinion of 11 March 2016, one should point out that that Opinion did not

refer to the rules of electing the President of the Tribunal. Consequently, the Commission has no legal point of reference here.

- Second, the Commission itself recognized that there is no definitive standard for electing constitutional court presidents, so imposing a specific model of proceeding would be inacceptable. The Commission's legislative concepts do not prove that other solutions cannot be adopted, in particular when they fall within the scope of Article 194 (2) of the Polish Constitution.

It is wrong to say, as the Commission did in paragraph 30, that it will be up to the Tribunal to decide whether Article 16 of the Act is compatible with Article 194 (2) of the Constitution. Yet the Venice Commission is of the opinion that "particularly in light of the current configuration of the Tribunal, this provision gives the President of Poland excessive leverage over the work of the Tribunal."

The Commission assesses Article 16 in the light of the current composition of the Tribunal, and takes it to mean that the Act gives the President of Poland excessive leverage over the work of the Tribunal. Such action lacks substance, however, since the Commission quotes no arguments to support its claim, nor does it explain why, given the current composition, the process of selecting candidates for President of the Tribunal gives the President of Poland excessive leverage over the Constitutional Tribunal. The arbitrary statement made by the Commission calls into doubt its honesty and impartiality. The Commission is acting on the claims that have been made for considerable amount of time by the current President of the Tribunal, whose aim is to ensure the political succession of the Tribunal's leadership, something A. Rzepliński is not even trying to conceal.

The topic of qualities of the Tribunal's President also appears further on in the Opinion. In paragraph 44, reflecting on the sequence of hearings, the Commission asserted: "The influential position given to the President of the Tribunal over this issue makes it all the more important that the President should enjoy the confidence of his or her colleagues."

The Commission's impartiality is also compromised by suggesting and proposing non-legal criteria for selecting candidates for the President of the Tribunal, and drafting provisions about the mechanism of electing the Tribunal's President which draw on or even copy the allegations made by a group of opposition deputies when applying to the Tribunal to examine the constitutionality of Article 16 of the Act.

5.3. In terms of substance, the Commission's opinion copies Tribunal's judgement No. K 39/16. The Venice Commission is brief and laconic on issues the Constitutional Tribunal did not pronounce upon in case K 39/16 (cf. paragraph 31 on attendance quorum for the plenary session). As regards provisions challenged by the Tribunal in judgement K 39/16, the Commission makes references to the Tribunal's positions and arguments, and agrees with their entirety. These remarks relate to the referral of cases to the full bench (paragraphs 32-35), the Prosecutor General's participation in the hearings (paragraphs 36-41), the sequence of cases (paragraphs 42-47), the setting of dates of hearings (paragraphs 48-52), the postponement of cases upon request by four judges (paragraphs 53-60), and the suspension of pending cases (paragraphs 64-72). Thus the Commission is not making its own analysis here, but rather draws on decisions issued by national organs. Its assessment is therefore derivative and makes no new contribution to the debate about the standards of the constitutional court.

It should also be highlighted that the Commission often presents the provisions it assesses in an imprecise way, which goes to show that it did not familiarize itself with the subject matter under examination. A case in point is the dissent of four judges during deliberations. Paragraph 56 of the Opinion reads: "It is a legitimate and valid aim to allow judges more time

for preparing a particularly complex case. In this respect Article 68.4 of the Act already provides for postponement of the deliberation for two weeks. Article 68.5-7 also does not depend on the complexity of the case but only on the disagreement between the majority of judges and the four dissenters. The second three month period in particular lacks any justification, because the four judges are not even required to prepare an alternative solution." Meanwhile, pursuant to Article 68 (6) of the 2016 Constitutional Tribunal Act: "Where the objection referred to in paragraph 5 is raised, the deliberation shall be adjourned for 3 months, and at the next deliberation held after the lapse of the said time-limit, the judges who raised the objection shall present their joined proposal for a new determination."

The Venice Commission recognizes the fact that judgement K 39/16 has caused changes in the Polish legal system. Hence the Commission's line of reasoning leads to the conclusion that the Constitutional Tribunal Act of 2016, in the points which were the subject matter of the Opinion of 11 March 2016, gives rise to no reservations about the implementation of Council of Europe standards. And this is where the Commission's Opinion should end. Yet its scope is wider, covering the assessment (conducted by the Commission in a selective way) of actions taken by public authorities.

5.4. By drawing on the above judgement of the Tribunal alone rather than an in-depth analysis, the Commission oversees the fact that the provision on the referral of cases to the full bench upon request by three judges aims to tap into the full wealth of knowledge and experience of a higher number of judges when issuing rulings which go on to determine the understanding of key norms in the domestic legal regime.

The point made by the Commission that the judicial request for adjudicating in the full bench may block and politicize the Tribunal's decision-making process is incomprehensible. Article 195 (3) of the Constitution requires the judges of the Tribunal to be non-partisan. It is wrong to assume either that hearings by the full bench would facilitate blocking and politicizing the Tribunal's decision-making process, as full-bench hearings of cases are a normal instrument of constitutional judiciary in many European countries. Moreover, it seems logical that the more judges are involved in making a determination, the less scope there is for personal bias to influence the final decision of the Tribunal. In other words, it is the full-bench hearings that best implement and safeguard the wish of the legislator to have non-partisan decisions taken by a constitutional court.

At the same time, designating the full bench to deal with certain crucial cases has no impact whatsoever on democratic rules and consequently on the constitutionality of the procedure for seeking a determination, for this matter is settled by the solution that has been introduced, whereby rulings are made by a simple majority vote (Article 69 (1)).

5.5. The postponement of full-bench deliberations as a result of an dissent, raised by four judges of the Tribunal, to the proposed determination, stems from recognizing the authority and experience of persons elected as judges of the Tribunal. If as many as four of them voice doubts about the determination to be taken, it appears to be legitimate that the whole bench should be given time to reflect on the final determination of the Constitutional Tribunal. In the event of a clear disagreement about matters so important that they are examined by the full bench, it seems to be the right practice to have adequate time for reflection, as the repercussions of rulings made in such circumstances could be particularly serious.

The solution challenged by the Venice Commission is in fact supposed to create a mechanism that would compel judges to reach compromise and overcome their differences caused by affiliation with specific political circles. Concerns about the negative effect that this could have on the duration of proceedings presuppose ill will on the part of judges, who, it is alleged, could be willing to artificially protract the Tribunal's work.

5.6. While assessing in general positively the fact that the Act has introduced exceptions to the rule whereby cases are heard by the Tribunal in the sequence of their receipt, the Commission states that it is still questionable whether introducing this rule makes sense. In the Commission's view, the rule compromises the Tribunal's independence and effective functioning (paragraphs 42-44).

It should be recalled here that:

1) the provision refers to the sequence of scheduling hearings at which applications are examined, which means that the questions of law and constitutional complaints are excluded from this rule;

2) also excluded from the sequence rule are applications concerning:

- preventive review of norms;
- constitutionality of the State budget bill or the interim State budget bill;
- constitutionality of the Act on the Constitutional Tribunal;
- determining the existence of an impediment to the exercise of office by the President of Poland;
- competence disputes;
- constitutionality of the purposes or activities of political parties (Article 38 (4)).

Moreover, the Act introduces an exception whereby the President of the Tribunal may set the date of a hearing by bypassing the sequence in which cases were received by the Tribunal, if this is justified by the necessity to safeguard the rights or freedoms of citizens, national security or the constitutional order (Article 38 (5)).

The solution that was introduced will make it possible to limit the scope of the President of the Tribunal's discretion over scheduling the hearings of cases/applications (selection of cases/applications to be heard first, made by the President of the Tribunal) that used to lead to arbitrary decisions which ran counter to the public interest. There is no better way of ensuring impartiality in fixing the calendar of case hearings than the sequence in which cases are received, as this is how common courts and many other institutions operate, which stems primarily from the objective nature of the proposed way of setting court hearing dates.

Moreover, the practice of hearing cases by constitutional courts in the sequence of receipt is no novelty to European legislators, with similar solutions being in place, among others, in the Czech Republic, Luxembourg, Slovenia and Lithuania.

Exceptions to the application of the rule in question, which respond to the needs in specific urgent situations, provide a sufficient guarantee for an effective and timely constitutional scrutiny. In particular, this solution implements recommendations made by the Venice Commission in its Opinion of last March. Enabling the President of the Constitutional Tribunal to schedule hearing by bypassing the sequence in which cases are received when this is justified by the necessity to safeguard the rights or freedoms of citizens, directly implements the Venice Commission's Opinion which stresses that the Tribunal has to be in a position to deal with urgent human rights, national security or constitutional order cases as a matter of priority.

6. The Commission has focused on criticising the government's actions, but when it is the government side that is raising objections to the Constitutional Tribunal's violations of law, this matter is not analysed in the Opinion. The government's position is being rejected. Such criticism is clearly expressed, e.g. in paragraph 88: "the Ministry could not explain who would be competent to determine such nullity, nor did they explain the legal basis for the exercise of such authority by the executive" or in paragraph 89 „the Chancellery had not

published them. However, the Chancellery could not explain on what legal basis such control was exerted by the executive."

The Commission at the same time gives the Tribunal a right to oversee its own activities, in other words, to be a judge in its own case. That is manifested in a sentence from paragraph 94: "Whether or not an action of a government authority is absolutely null has to be decided by a court and in this circumstance, that court must be the Tribunal itself." Such attitude cannot be justified on rule-of-law grounds, let alone the application of the principle of the separation and balance of powers. And that again speaks to the Venice Commission's negligence and bias.

The Commission appears to be lacking knowledge of the content of the dissenting opinions expressed to the Tribunal judgements or is manipulating them for political purposes. Paragraph 94 reads: "The Tribunal, including dissenting judges, clearly is not of the opinion that its judgments are procedurally defective or lack legal force." This statement is wrong. It is in the dissenting opinions formulated since 9 March 2016 that the judges have been pointing to procedural defects of the judgements. The most serious charge relates to the defective composition of the Tribunal's adjudicating bench.

6.1. The Commission's negative attitude is particularly visible as regards the publication of the Tribunal's judgements. The Commission portrays the government's fault in its failure to publish the judgements, but it does not analyse procedural breaches on the part of the Tribunal. The Commission invokes the examples from other countries about the binding force of the court judgements, including those of constitutional courts (see paragraphs 77-80). The Commission, however, has not performed an in-depth analysis of the issue in Poland's legal system. The comparative legal analysis argument cannot determine a negative assessment of activities of public authorities in another country. The Commission fails to understand the meaning behind the publication of a Tribunal judgement in the official gazette in the light of the Polish Constitution. Therefore, granting such value as promulgation in a gazette to another form of communicating a judgement to the public (referred to by the Commission in paragraph 80) will be equal to violating the Polish Constitution.

It must be noted that the Commission has not understood the parliamentary majority's position on the legal grounds for publishing Tribunal judgements. Paragraph 86 reads: "the discussions of the delegation of the Commission in Warsaw showed a wide variety of interpretations by the State authorities of the issue of publication. The representative of the majority in the Senate presented his view that Article 89 of the Act had lost its force because of the Tribunal's judgment of 11 August. As a consequence, no procedure for the publication for the Tribunal's judgments would be available anymore and therefore none the Tribunal's judgments could not be published henceforth. The delegation did not receive a reply to the question how a judgment that was considered to be illegal could have such an effect." But the problem lies in the uncertainty that emerged as to the procedure for initiating the publication of Tribunal judgements in the official gazette, after the decision in the K 39/16 case. There is a divergence of opinion on the legal regime now in force. The government recognises the Act on the Constitutional Tribunal to be binding as adopted, unaffected by ruling K 39/16. The Tribunal's President considers the Act to be binding but inclusive of the amendments arising from the Tribunal's judgement. For this reason the government considers a request of the Tribunal's President to be necessary for the publication. And the Tribunal's President should not send such request to the Prime Minister, if he was committed to the claim that he is bound by the Tribunal's judgement which repealed the obligation of the Tribunal's President to file a request. What follows from this fact is that Poland's legal system lacks a norm that would define an institution authorised to initiate the publication of Tribunal judgements (vide:

opinion by the Tribunal judge Prof. M. Muszyński for the Tribunal's President of 16 August 2016).

6.2. The Venice Commission's position on the possible actions of the Minister of Justice-Prosecutor General, presented upon reviewing a provision about the Prosecutor General's participation in a hearing before the Tribunal, could be quoted as an example of intellectual plagiarism on the part of the Venice Commission. Besides repeating the Tribunal's view, the review is also being done through the prism of the current politics. That leads to the conclusion that in other conditions such review could have been different. In paragraph 37 of the Opinion, the Commission says: "Furthermore, it should be noted that since March 2016 the functions of the Prosecutor General and the Minister of Justice have been merged. The Minister of Justice now fulfils the competences of the Prosecutor General, as was the case before the year 2011. Notably as legislation under review by the Tribunal will often have been proposed by the Minister of Justice or other ministries, the Minister has a direct interest in the proceedings of the Tribunal and should not be able to block or delay the proceedings."

This statement reveals a negative assessment of combining two functions: the Prosecutor General and the Minister of Justice. The Commission is thus indirectly taking a stance on the state's systemic features, which it may not do.

At the same time, the Commission repeats the points raised by the opposition and Tribunal judges that "the fact that these provisions were already part of the 1997 Act (Articles 29.5 and 60.4) does not change this assessment, not least because, as noted above, the Act of 22 July substantially increases the jurisdiction of the full bench and allows three judges or the President to refer any case to the full bench without enabling the other judges to refuse such a transfer." (paragraph 39).

The reasoning is of political, not legal, nature, and once more illustrates the lack of objectivity on the Commission's part, which from the start presupposed that Poland's public authorities had negative intentions. By anticipating the Prosecutor General's future line of conduct, the Commission assumes that he will be delaying the Tribunal's work by his absence. Besides tactless behaviour, such action signals a biased and negative attitude towards the Polish government, and political sympathies for the opposition.

6.3. On the one hand, the Commission points to the government's malfunctioning, on the other it uncritically accepts the Tribunal's grounds for deciding on case K 39/16 without hearings and examining the case at a closed-door session (paragraph 113). The Commission has not put much effort into considering the arguments raised in dissenting opinions to that judgement.

That is a lack of objectivity on the part of a body that should be marked and guided by objectivity in its deliberations.

7. The last controversial issue raised in the Venice Commission's opinion is the Tribunal's composition. The Commission repeats erroneous and false information about the nature and effects of Tribunal judgements as regards electing judges to the Tribunal (see paragraphs 102-106). The Opinion furthermore notes that the "December judges" were elected in violation of the Constitution according to the case law of the Tribunal (paragraph 102). No such category of law exists in Poland's legal system. In its previous opinion of 11 March 2016, the Venice Commission held that the election was run allegedly in violation of the Constitution, as that was what, according to the Commission, the Constitutional Tribunal had found. So, the Commission must have had the same in mind. For this reason it must be noted and recalled that the Tribunal has no competence to assess the Sejm's creative function (which was upheld by the Tribunal itself by discontinuing the proceedings about the

resolution on electing Tribunal judges, case no. U 8/15, exactly on the grounds of the lack of its competence). The judgement of 3 December 2015 only applied to reviewing the constitutionality of a statutory norm (Art. 137). That norm pertained to the time-frame for submitting applications with the names of candidates for Tribunal judges.

The Commission's position on the status of Tribunal judges is unacceptable, either. In its current Opinion, the Commission has gone further than in that of 11 March 2016. Whereas in the latter the Commission recommended that the issue of judicial appointments should be solved in full observance of the Tribunal's judgements, failing to specify what it understood by that, in this Opinion the Commission directly interferes in Poland's internal affairs by demanding a specific scenario with respect to the Tribunal's composition.

In paragraph 103, the Commission plainly says that: "A full respect of the Tribunal's judgments, notably that of 3 December 2015, would result in the integration of the October judges into the Tribunal. This has not happened." The Commission furthermore interferes in the Polish Sejm's sovereign powers. On this point, it alleges that "In April 2016, a vacancy at the Tribunal was not used to give the oath to one of the October judges but the Sejm elected a new candidate and the President of Poland accepted his oath. This new candidate became one of the twelve sitting judges" (paragraph 104).

The view presented by the Commission on the Tribunal judges is unacceptable, aims at the state's sovereignty, and bellies the apolitical nature of the Commission.

Owing to the above, part J, "Composition of the Tribunal," of the Opinion not only covers matters going well beyond the request for opinion, but also reveals partisanship of the Commission, which had failed to carry out its own analysis along the lines of the Polish Constitution; instead, it repeated theses about the Tribunal's composition, theses which allegedly arise out of Tribunal judgements but which have no legal basis.

8. To summarize, it must be noted that:

- Contrary to the declaration contained in paragraph 120 of the draft Opinion, the Commission has, as a matter of fact, gone much beyond examining whether the legislation on the Tribunal is detrimental to the proper functioning of the Constitutional Tribunal. The Commission has directly assessed the Polish authorities who apply law;
- Alleged charges detailed by the Commission and relating to individual statutory solutions directly correspond to the charges contained in the requests for reviewing the constitutionality of the Constitutional Tribunal Act of 22 July 2016, filed with the Tribunal by opposition MPs. The Commission itself has found no other defects, and its line of reasoning behind the assessment with this respect overlaps with the grounds for the Tribunal's judgement in case no. K 39/16;
- The Commission's Opinion has discussed at length the procedure to elect the President of the Tribunal; it has noted that no single standard exists in this area; however, by reviewing the regulations through the prism of political situation it has concluded that the current procedure for proposing candidates for the President of the Tribunal to the President of Poland endangers the independence of the Tribunal, because it gives the President of Poland excessive leverage over the Tribunal's work (see paragraph 123). However, the Commission has failed to analyse the powers of the President of Poland and his role under Art. 194(2) of the Constitution. Here, it has also repeated groundless charges that had been formulated by the opposition in a request no. K 44/16 to the Tribunal;

- The Commission has made an assessment of the Chancellery of the Prime Minister as regards its actions related to publishing Tribunal judgements, even though this element falls outside the subject scope of what is expected of the Opinion;
- The Commission wrongfully asserts that: "By adopting the Act of 22 July (and the Amendments of 22 December), the Polish Parliament assumed powers of constitutional revision which it does not have when it acts as the ordinary legislature, without the requisite majority for constitutional amendments" (paragraph 126). The Commission fails to notice that it is the Polish Constitution in Art. 197 that gives the legislator the right to specify by statute the organisation of the Tribunal as well as the mode of proceedings before it;
- The Commission does not conceal its negative attitude towards the government and the legislator, which is clearly emphasised in paragraph 127 of the Opinion. The Commission closely analyses the legality of the government actions but it stops short of analysing in detail the Tribunal's proceedings; it furthermore passes over the conclusions from the dissenting opinions to Tribunal judgements;
- By manipulating the facts, the Commission is trying to promote the view that the Tribunal in December 2015 ruled on the legality of the election of individual Tribunal judges; by so doing, the Commission tries to convey the message that taking the oath from those persons is obligatory;
- The Commission advances a thesis, one which cannot be reconciled with the Polish Constitution, to the effect that the Constitutional Tribunal is the sole ultimate arbiter on constitutional issues. What is more, it extends this attribute of the Tribunal to all matters, i.e. not only those related to normative acts (to which the Tribunal's role is limited by the Constitution). By so doing, the Commission fails to consider the legal system specific to Poland and the fact that the Constitution entrusts different institutions with resolving constitutional issues. The Constitutional Tribunal is one of the most important among them, but the importance of the Tribunal of State cannot be overlooked, which rules on violations of the Constitution by persons who are public authorities specified by statute. Also the President of Poland is equipped with powers and tools to protect the Constitution.

The general impression is that many allegations made by the Venice Commission against solutions adopted in the Act rest on the assumption that state authorities will act in bad faith. Such assumption makes nearly all regulations, irrespective of their subject matter or provenance, vulnerable to criticism, and their effectiveness open to being called into question. It must be noted, however, that the legislator in each country guided by the rule of law acts according to diverse principles, i.e. ones of the functioning of public authorities in good faith and in a spirit of constructive cooperation in exercising their legal duties and statutory powers.

The above analysis leads to the conclusion that the Venice Commission is not capable of providing an opinion of a satisfactory quality in terms of substance. The Commission is not impartial or apolitical in its work. That is why the results of its work give rise to doubts as to its reliability, doubts that border on certainty. The results point to a hidden political agenda: supporting the opposition and the illegal actions of the Constitutional Tribunal's President over the selection of candidates for the future president of the Tribunal.

Finally, the Government of the Republic of Poland would like to thank the Venice Commission for its offer of further assistance in solving the issues around the Constitutional Tribunal. In the light of the above remarks that refer to the partisan and legally defective draft Opinion, the Government of the Republic of Poland is in doubt over the advisability of further

cooperation with the Venice Commission on that matter. The Government holds the view that the problem at hand, as falling into the domain of Poland's internal affairs, will be dealt with by the Polish Sejm in partnership with other state authorities.